

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FULTON WASHINGTON,) Case No. CV 06-03946-DDP
) CP 96-00557 WMBK
Petitioner,) ORDER DENYING PETITIONER'S
) FEDERAL RULE OF CIVIL PROCEDURE
v.) 60(b)(4) MOTION
)
UNITED STATES OF AMERICA,) [Petition filed on July 9,
) 2007]
Respondent.)

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This matter is before the Court on Petitioner Fulton Washington's Federal Rule of Civil Procedure 60(b)(4) motion¹ challenging the district court's denial of his October 1, 2001

¹ Although Petitioner labels his motion as a Rule 63, 60(b)(4) & (6) motion, the Court construes it as a single 60(b)(4) motion. Rule 63 merely outlines the procedure for replacing a judge when he or she is unable to proceed, while Rule 60(b)(4) authorizes the Court to relieve a party of an order on the ground that it is void. Petitioner appears to conflate Rule 63 and 60(b)(4) by claiming that the judgment is void [Rule 60(b)(4)] on the ground that the procedure outlined in Rule 63 was not properly followed. Thus, the Court construes Petitioner's use of these two rules as a single Rule 60(b) motion. Rule 60(b)(6) authorizes the court to relieve a party of a judgment for "any other reason justifying relief." However, Petitioner fails to allege any specific reasons that would justify relief pursuant to Rule 60(b)(6). As such, the substance of Petitioner's Rule 63, 60(b)(4) & (6) motion amounts to a single Rule 60(b)(4) motion.

1 habeas petition under 28 U.S.C. § 2255. Despite Respondent's
2 contention that Petitioner's motion should be construed as
3 arising under 28 U.S.C. § 2255, the Court finds that it is
4 properly construed as a Rule 60(b)(4) motion seeking relief from
5 order. After reviewing the papers submitted by the parties, the
6 Court denies Petitioner's Rule 60(b)(4) motion.

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8 **I. Background**

9 On November 12, 1996, Petitioner was found guilty of
10 conspiracy to manufacture phencyclidine ("PCP"), in violation of
11 21 U.S.C. §§ 846 and 841(a)(1), possession of
12 piperidinocyclohexane-carbonitrile ("PCC") with the intent to
13 manufacture PCP, in violation of 21 U.S.C. § 841(a)(1), and
14 attempted manufacture of PCP, in violation of 21 U.S.C. §§ 846
15 and 841(a)(1).

16 On October 1, 2001, Petitioner challenged his sentence by
17 filing a 28 U.S.C. § 2255 motion. On February 2, 2006, the
18 district court denied the § 2255 motion on the merits. On June
19 22, 2006, Petitioner challenged his sentence yet again by filing
20 another § 2255 motion, which this Court denied on August 25,
21 2006 on the ground that it was a successive petition.
22 Subsequently, Petitioner sought to obtain a certificate of
23 appealability, and on March 27, 2007, the Ninth Circuit denied
24 Petitioner's request. On July 9, 2007, Petitioner filed the
25 instant motion pursuant to Federal Rules of Civil Procedure 63
26 and 60(b)(4) & (6), seeking to challenge the district court's
27 February 2, 2006 order denying his October 1, 2001 28 U.S.C. §
28 2255 habeas petition.

1 **II. Legal Standard**

2 28 U.S.C. § 2255(h) provides that second or successive
3 habeas motions must be certified as provided in 28 U.S.C. §
4 2244. Section 2244(b)(3)(A) states that "[b]efore a second or
5 successive application ... is filed in the district court, the
6 applicant shall move in the appropriate court of appeals for an
7 order authorizing the district court to consider the
8 application." "In most cases when the factual predicate for a
9 Rule 60(b) motion also states a claim for a successive [habeas]
10 petition ... the Rule 60(b) motion should be treated as a
11 successive habeas petition." Thompson v. Calderon, 151 F.3d
12 918, 921 (9th Cir. 1998). Conversely, when the factual
13 predicate for a Rule 60(b) motion does not state a claim for a
14 successive petition, it should not be treated as such. Indeed,
15 "a bright line rule equating all Rule 60(b) motions with
16 successive habeas petitions would be improper." Id. at 921 n.3.

17 **III. Discussion**

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19 A. Petitioner's Motion is Properly Construed as Arising
20 Under Rule 60(b)

21 The issue before the Court is whether Petitioner's motion
22 is properly construed as arising under 28 U.S.C. § 2255 or
23 Federal Rule of Civil Procedure 60(b)(4). As previously
24 mentioned, the Court finds that it is properly construed as the
25 latter.

26 Respondent argues that Petitioner's motion is, in
27 substance, a § 2255 habeas petition. The Court disagrees. A
28 Rule 60(b) motion challenges the validity of a court order,

1 while a § 2255 petition challenges the validity of a sentence or
2 conviction. The distinction between a collateral attack upon
3 the order denying Petitioner habeas relief and a collateral
4 attack upon the underlying sentence itself is relevant because a
5 challenge to the former is a use of the Federal Rules not
6 inconsistent with the Anti-Terrorism and Effective Death Penalty
7 Act ("AEDPA"),² and thereby within the reach of the Federal
8 Rules of Civil Procedure, while a challenge to the latter is
9 inconsistent with AEDPA, and accordingly not within the reach of
10 the Federal Rules. See Gonzalez v. Crosby, 545 U.S. 524, 529
11 (2005) (holding that the use of Federal Rules in habeas
12 proceedings is permissible to the extent that they do not
13 conflict with the applicable habeas statute). If Petitioner
14 were in fact attacking the underlying sentence itself, the use
15 of his Rule 60(b)(4) motion would be inconsistent with AEDPA
16 because it would allow Petitioner to circumvent the rule against
17 successive petitions by allowing him to lodge a second attack on
18 his sentence without authorization from the court of appeals.
19 Petitioner's use of Rule 60(b)(4) to attack the validity of the
20 order denying him habeas relief on the other hand, is consistent
21 with AEDPA because it allows him to raise challenges to the
22 manner in which his habeas petition was handled.

23 Here, because Petitioner's motion alleges that the order
24 denying his § 2255 petition was void because of judicial
25 misconduct, he does not seek to challenge the validity of the
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27 ² AEDPA governs the procedure for filing petitions for
28 writs of habeas corpus pursuant to, among other statutes, § 28
U.S.C. 2255.

1 underlying sentence itself. Petitioner's use of Rule 60(b) as a
2 means of attacking the 2006 denial of his § 2255 motion is thus
3 consistent with the policy of preventing abuse of the writ of
4 habeas corpus that underlies AEDPA. Cf. McCleskey v. Zant, 499
5 U.S. 467, 489 (1991) (holding that "a petitioner can abuse the
6 writ by raising a claim in a subsequent petition that he could
7 have raised in the first"). As Petitioner is not attempting to
8 litigate issues that could have been raised in his first
9 petition, his use of Rule 60(b)(4) is consistent with AEDPA.
10 Accordingly, the Court is free to entertain his allegation that
11 the February 2, 2006 order is void.

12 B. The February 2, 2006 Order is not Void

13 Approximately five years after Petitioner filed his October
14 1, 2001 § 2255 habeas petition, the then presiding judge of
15 Petitioner's case, Judge Byrne, passed away. Shortly
16 thereafter, Judge Tevrizian succeeded Judge Byrne, and denied
17 Petitioner's § 2255 motion. Petitioner claims that Judge
18 Tevrizian did not adequately review the files and records of his
19 case, and thus made erroneous findings of fact and conclusions
20 of law.

21 "A judgment is void if the court that considered it lacked
22 jurisdiction of the subject matter, or if the parties or the
23 court acted in a manner inconsistent with due process of law."
24 Watts v. Pinckney, 752 F.2d 406, 409 (9th Cir. 1985) (internal
25 quotation marks and alterations omitted). Petitioner claims
26 that the successor judge's alleged unfamiliarity with the record
27 rendered the order denying him habeas relief void on the ground
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1 that it was "inconsistent with due process of law."
2 [Petitioner's Rule 60(b)(4) Motion, at 1]. The Court disagrees.
3 First, the record does not support a finding that the successor
4 judge was unfamiliar with the case. Judge Tevrizian wrote a
5 detailed 28-page order denying Petitioner's § 2255 motion. The
6 order included all of the relevant procedural and factual
7 background information, and a detailed analysis applying the
8 applicable law to the facts of Petitioner's case. Additionally,
9 Petitioner's allegation that Judge Tevrizian was unfamiliar with
10 the case is conclusory; he fails to provide the Court with any
11 evidence in support thereof. Thus, the Court rejects
12 Petitioner's claim that the judgment is void on the ground that
13 the successor judge was unfamiliar with the record.

14 **IV. Conclusion**

15 For the foregoing reasons, the Court hereby denies
16 Petitioner's Federal Rule of Civil Procedure 60(b)(4) motion.
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20 IT IS SO ORDERED.

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24 Dated: 6-18-08


DEAN D. PREGERSON
United States District Judge